

COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION

Decision mailed: 12/31/10  
Civil Service Commission 08

One Ashburton Place: Room 503  
Boston, MA 02108  
(617) 727-2293

**KIMBERLY BERSANI,**  
*Appellant*

v.

**CITY OF QUINCY,**  
*Respondent*

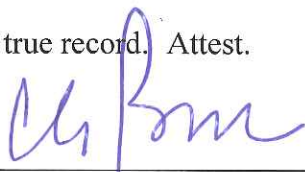
Case No.: D-10-4

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on December 30, 2010 to acknowledge receipt of the report of the Administrative Law Magistrate dated November 19, 2010. Neither party submitted comments to the Commission. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on December 30, 2010.

A true record. Attest.



Christopher C. Bowman  
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a Commission decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Sal Romano and Joseph McArdle (for Appellant)  
Janet S. Petkun, Esq. (for Appointing Authority)  
Richard C. Heidlage, Esq. (DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

98 NORTH WASHINGTON STREET, 4<sup>TH</sup> FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE  
CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-727-7060  
FAX: 617-727-7248

November 19, 2010

Christopher C. Bowman, Chairman  
Civil Service Commission  
One Ashburton Place, Room 503  
Boston, MA 02108

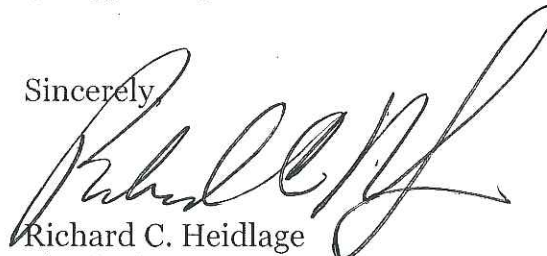
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**Re: Kimberly Bersani v. City of Quincy**  
***DALA Docket No. CS-10-800***  
***CSC Docket No. D-10-04***

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,

  
Richard C. Heidlage  
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: Sal Romano  
Joseph McArdle  
Janet S. Petkun

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

**Division of Administrative Law Appeals**

**Kimberly J. Bersani,**  
Petitioner

v.

Docket No.: D-10-04  
DALA No.: CS-10-800

**City of Quincy,**  
Appointing Authority

**Appearance for Petitioner:**

Sal Romano  
Joseph McArdle  
Mass. Laborers' District Council  
7 Laborers' Way  
Hopkinton, MA 01748

**Appearance for Appointing Authority:**

Janet S. Petkun  
Assistant City Solicitor  
City of Quincy  
1305 Hancock Street  
Quincy, MA 02169

**Administrative Magistrate:**

**Kenneth J. Forton, Esq.**

**SUMMARY OF RECOMMENDED DECISION**

Appeal dismissed where the City of Quincy proved by a preponderance of the evidence that there was just cause to suspend Appellant for three days without pay where the credible evidence showed that the Appellant used intimidating foul language against several of her co-workers and stormed out of the building during a busy day in the Department of Public Works.

**RECOMMENDED DECISION**

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Kimberly Bersani, appeals the decision of the Appointing Authority, City of Quincy, to suspend her by

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written notice dated December 7, 2009, for three (3) working days without pay. The appeal was timely filed on January 11, 2010. A hearing was held on March 5, 2010 at the offices of the Division of Administrative Law Appeals, 98 North Washington Street, Boston. Two cassette tapes of the hearing were made. As no notice was received from either party, the hearing was declared private.

At the request of the Appellant, I sequestered the City's witnesses outside the hearing room and called them in to testify one-by-one.

I admitted seven exhibits into evidence. Exs. 1-7. The Petitioner testified on her own behalf. The Respondent called Linda Bowes, secretary to the Commissioner of Public Works; Cindy Lou Ohlson, former Clerk Typist in the Water Billing Department; Susan Clifford, former Office Manager of the Water Billing Department; and Lawrence Prendeville, Commissioner of Public Works for the City of Quincy as witnesses. The parties submitted eight stipulated facts.

### **FINDINGS OF FACT**

Based upon the stipulated facts and the evidence presented by the parties, I make the following findings of fact:

1. Kimberly Bersani was a tenured civil service employee of the City of Quincy in the position of Water Service Inspector. She had been employed in that position for approximately four years at the time of the discipline. Stipulations 1, 2, 3.
2. Ms. Bersani's prior discipline included a one-day suspension on September 29, 2008. The discipline was based on conduct which occurred on September 26, 2008, when Ms Bersani threatened her supervisor with union action, swore at him and

hung up the telephone. The suspension was rescinded by the Commissioner of Public Works, Lawrence Prendeville. Ex. 5; Testimony Prendeville.

3. On November 6, 2009, there was an incident in the Department of Public Works, 55 Sea Street, Quincy, MA. Stipulation 4.

4. During the incident, Ms. Bersani used profanity and abusive language toward other employees. Stipulation 5.

5. That day, Robert Derbes, an independent contractor who had done some work for the City, brought food into the Department of Public Works. Testimony Bowes, Bersani.

6. There had been an election in the City on November 3, 2009. The incumbent mayor, Thomas P. Koch, defeated William Phelan. Testimony Bowes.

7. Linda Bowes, secretary to Mr. Prendeville, testified that Mayor Koch is her brother. Ms. Bowes has worked for the City over twenty years. Her brother was inaugurated for his first term in January 2008. Testimony Bowes.

8. As Mr. Derbes was leaving the area where Ms. Bowes was situated, he commented that the food was "for everyone who did not support Phelan." Ms. Bersani was present and heard the comment. Testimony Bowes, Bersani.

9. Ms. Bersani supported William Phelan during the election. Testimony Bersani.

10. Ms. Bersani became upset by Mr. Derbes's remark. Testimony Bersani.

11. Shortly after Mr. Derbes and Ms. Bersani left, Susan Clifford had a conversation with Ms. Bersani and advised her that there was food available. Testimony Clifford, Bersani.

12. In response to Ms. Bersani's comment that the food was "not for Phelan supporters," Ms. Clifford told Ms. Bersani that Mr. Derbes was joking and that she should just eat. Testimony Clifford, Bersani.

13. Shortly thereafter, Ms. Bowes was contacted by an employee who stated that Ms. Bersani was telling people that Ms. Bowes told Ms. Bersani that she could not have any of the food because she did not support Mayor Koch. Testimony Bowes.

14. Shortly thereafter, Ms. Bowes telephoned Bersani. During the phone call with Ms. Bowes, Ms. Bersani became angry and demanded to know who had called Ms. Bowes and used the word "fuck" repeatedly. Testimony Bowes, Bersani.

15. Shortly thereafter, Ms. Bersani telephoned the Water Billing Department, where Ms. Clifford worked. Cindy Lou Ohlson answered Ms. Bersani's call to the Water Billing Department. Testimony Ohlson, Clifford, Bersani.

16. Ms. Ohlson's father is Mr. Derbes. Ohlson's Testimony.

17. During the phone call with Ms. Ohlson, Ms. Bersani became angry and used the word "fuck" repeatedly and demanded to speak with that "big mouthed fucking cunt Sue." Ex. 7; Testimony Ohlson.

18. During their telephone conversation, Ms. Ohlson put Ms. Bersani on hold. Testimony Ohlson.

19. Ms. Ohlson then told her supervisor, Sue Clifford, about the conversation with Ms. Bersani. Testimony Ohlson.

20. After leaving the area to make a phone call, Ms. Ohlson heard raised voices, which she believed to be Ms. Bersani and Ms. Clifford. Testimony Ohlson.

21. Ms. Bersani concluded that the Susan Clifford had earlier called Ms. Bowes and informed Ms. Bowes that Ms. Bersani was telling people that she was not allowed to have any of the food brought in by Mr. Derbes. Testimony Bersani.

22. Shortly after leaving the building, Ms. Bersani called and left a message, using profanity, on the answering machine for the Water Billing Department. Testimony Bersani.

23. Ms. Bersani was "very angry," and she could not believe how angry she was. Testimony Bersani.

24. Ms. Bersani returned approximately thirty minutes later to confront her co-workers. Testimony Bersani.

25. When Ms. Bersani came back to the office, Ms. Bersani got close to Ms. Clifford's face and called her a "fucking lying trouble making bitch." Ex. 6; Testimony Bersani, Clifford.

26. When Ms. Clifford told Ms. Bersani to calm down, lower her voice and not speak to her in that manner, Ms. Bersani continued to swear and then left the office, slamming the door behind her. Ex. 6; Testimony Clifford.

27. While these incidents were taking place at the Department, the phones were very busy because water bills had just gone out. Testimony Clifford, Ohlson.

28. Ms. Ohlson and Ms. Clifford wrote incident reports regarding the November 6, 2009 incidents with Ms. Bersani. The incident reports were given to Brian Carlisle, the supervisor of the Water, Sewer and Drain Department. Exs. 6, 7; Testimony Ohlson, Clifford

29. Mr. Prendeville was notified of the incidents involving Bersani.

Testimony Prendeville.

30. The City has a policy against harassment and sexual harassment.

Testimony Prendeville.

31. While swearing is heard at the Department of Public Works, swearing and profanity that is directed at co-workers or superiors is not tolerated. Testimony Prendeville.

32. After reviewing the incident reports, speaking with Brian Carlisle, and meeting with Ms. Bersani and union representatives, Mr. Prendeville decided to suspend Ms. Bersani for three days without pay. Ex. 1; Testimony Prendeville.

33. In a letter dated November 16, 2009, Ms. Bersani appealed the three-day suspension. Ex. 2.

34. A hearing was conducted on December 2, 2009 and the suspension was upheld by Stephen J. McGrath, Director of Human Resources. Ex. 3.

35. On December 7, 2009, Mayor Thomas P. Koch upheld the decision of the hearing officer. Ex. 4.

36. Ms. Bersani filed an appeal with the Civil Service Commission on January 11, 2010.

### **CONCLUSION**

After reviewing all the testimony and evidence in this case, I conclude that the City has demonstrated by a preponderance of the evidence that just cause existed to suspend Ms. Bersani from her position as Water Service Inspector for three days.



The role of the Civil Service Commission is to determine “whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” *City of Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 304 (1997). See also *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003); *Police Dep’t of Boston v. Collins*, 48 Mass. App. Ct. 408, 411 n.5 (2000); *Town of Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983). An action is “justified” when it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” *City of Cambridge*, 43 Mass. App. Ct. at 304 (quoting *Selectmen of Wakefield v. Judge of First Dist. Court of E. Middlesex*, 262 Mass. 477, 482 (1928)); *Commissioners of Civil Service v. Municipal Ct. of the City of Boston*, 259 Mass. 211, 214 (1971).

The Commission determines justification for discipline by inquiring “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service.” *School Committee of Brockton v. Civil Service Comm’n*, 43 Mass. App. Ct. 486, 488 (1997) (quoting *Murray v. Justices of Second Dist. Court of Eastern Middlesex*, 389 Mass. 508, 514-15 (1983)). If the Commission finds that the appointing authority has proven by a preponderance of the evidence that there was just cause for an action taken against an appellant, the Commission shall affirm the action of the appointing authority; otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by

the appointing authority. *Town of Falmouth v. Civil Service Comm'n*, 61 Mass. App. Ct. 796, 800 (2004); *Town of Watertown*, 16 Mass. App. Ct. at 334.

“[T]he question before the commission [is] not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.” *Town of Watertown*, 16 Mass. App. Ct. at 334.

In this case, the City of Quincy has proven by a preponderance of the evidence that the suspension of Ms. Bersani was justified. Ms. Bersani stipulated that she used profanity and abusive language toward other employees, though she denied using profanity and abusive language to the extent described by her co-workers. By her own admission, Ms. Bersani was very angry, swore at her co-workers and returned to the Department for the specific purpose of confronting those who she thought made “trouble” for her.

In coming to these conclusions, I was not required to make any substantial findings of credibility because Ms. Bersani’s testimony on her actions was substantially similar to the testimony of the rest of the witnesses. She half-heartedly testified that her language was not quite as bad as the other witnesses said that it was, but she admitted that she used the word “fuck” in anger against her fellow employees several times, stormed out of the building and came back later to confront one of the employees. Swearing at and insulting co-workers is “substantial misconduct.” *School Committee of Brockton*, 43 Mass. App. Ct. at 488.

This leaves the question of whether or not the substantial misconduct impaired the efficiency of the public service. The evidence on this point was also unequivocal. While the incidents of November 6, 2009 were going on at the Department, the employees testified that bills had just gone out and that the phones were busy. Not only did Ms. Bersani's conduct prevent her from doing her own job, it also stopped her co-workers from answering the phones and doing the rest of their job duties. Ms. Bersani's conduct impeded the efficiency of the Department of Public Works. *See McNamara v. City of Fitchburg*, 11 MCSR 7 (1998) (four-day suspension upheld where use of foul language unprofessional and counterproductive to the mission of the department).

Ms. Bersani argues that there is not just cause for her discipline because she was unaware that swearing at her co-workers was prohibited conduct in her department. First, she asserts that the City of Quincy does not have a rule against foul language in the workplace. Mr. Prendeville testified that the City enforces a policy against harassment and sexual harassment, explaining that even though swearing is sometimes heard at the Department of Public Works it is not tolerated when directed at a co-worker or supervisors. His testimony is consistent with case law surrounding this subject. *See Robertson v. Dep't of Correction*, 20 MCSR 607 (2007) (just cause for five-day suspension where employee directed foul language at a co-worker); *Goode v. Dedham Police Dep't*, 12 MCSR 46 (1999) (just cause for five-day suspension where officer directed foul language at fellow officer).

This is not a case where the foul language was "trivial" or "inane." *See Ward v. Town of Billerica*, 16 MCSR 7 (2003) (no just cause for five-day suspension where foul language was trivial and inane); *Lawler v. Boston Police Dep't*, 10 MCSR 161 (1997) (no

just cause for five-day suspension where foul language was not intended to be disrespectful or insulting). Calling a co-worker a “big mouthed fucking cunt” and getting close to her face and personally calling her a “fucking lying trouble making bitch” is neither inane nor trivial; it is threatening and cannot be tolerated in the workplace.

What’s more, Ms. Bersani had been suspended for one day in the past because she swore at a fellow employee in anger and hung up the phone, and she received notice of the decision to suspend her. Even though the suspension was later rescinded by Mr. Prendeville, this discipline certainly placed Ms. Bersani on notice that foul language directed at a fellow employee in anger would not be tolerated in her workplace. *See Batho v. Pittsfield Public Schools*, 21 MCSR 258 (2008) (just cause for five-day suspension where custodian used foul language and there has been other recent disciplinary incidents involving disrespectful behavior).

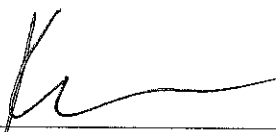
In making these findings, I have considered whether or not the suspension was retaliation against Ms. Bersani for supporting William Phelan against the incumbent mayor, Thomas Koch. Since this incident occurred just after an election, it must be considered as at least a possibility. Ms. Bersani, however, did not present any evidence supporting this theory. Surely, the fact that this incident happened just after the election amplified emotions that day, but that does not mean that the suspension was politically motivated. The evidence is that Ms. Bersani swore at several of her coworkers in anger on a very busy day in her office. While the events were unwinding, none of the people involved were doing their jobs. Plus, Ms. Bersani had recently engaged in similar behavior with another city employee and was disciplined for it.

Considering these facts, without any credible evidence that the suspension was motivated by politics, I must conclude that the City has proven by a preponderance of the evidence that Ms. Bersani engaged in "substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." *School Committee of Brockton v. Civil Service Comm'n*, 43 Mass. App. Ct. 486, 488 (1997)

The appeal is therefore dismissed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS



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Kenneth J. Forton  
Administrative Magistrate

DATED:      **NOV 19 2010**